

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CHURCH & DWIGHT CO., INC.,

Plaintiff,

v.

SPD SWISS PRECISION DIAGNOSTICS,
GMBH,

Defendant.

Civil Action No. 1:14 CV 585 (AJN)

**DIRECT TESTIMONY OF
WENDY BISHOP**

I, Wendy Bishop, declare as follows:

1. I am currently the Group Brand Manager of the Oral Care Device business for plaintiff Church & Dwight Co., Inc. (“Church & Dwight”). From January 2013 through July 2017, I was the Group Brand Manager of Women's Health for Church & Dwight. I submit this declaration as my direct trial testimony for the damages phase of the above-captioned case. I make this declaration based on my own personal knowledge and experience.

2. Church & Dwight is the owner of the FIRST RESPONSE brand of home pregnancy test kits, ovulation test kits, and fertility test kits. I have been employed by Church & Dwight for approximately 17 years. I began working on the FIRST RESPONSE brand in 2011, and assumed the position of Group Brand Manager of Women’s Health, which includes the FIRST RESPONSE brand, in 2013. My responsibilities as Group Brand Manager of Women’s Health included oversight of the marketing of and advertising for the FIRST RESPONSE brand, including FIRST RESPONSE home pregnancy test kits. In addition, I had Profit & Loss (sometimes referred to as “P&L”) responsibility for the FIRST RESPONSE brand, which included monitoring FIRST RESPONSE product sales, as well as marketing and other expenses for the brand.

3. Church & Dwight has sold a number of different types of analog and digital home pregnancy test kits under the FIRST RESPONSE brand. These include: Early Result, which is an analog test; Rapid Result, which is an analog test; Gold Digital, which is a digital test; Test & Confirm, which is a combination kit that includes one Early Result analog test and one Gold Digital test; and Pregnancy Pro, which is a digital test.

[REDACTED]

5. FIRST RESPONSE pregnancy test kits are generally sold at the same retailers that carry and sell the CLEARBLUE brand pregnancy test kits of SPD Swiss Precision Diagnostics GmbH (“SPD”), including the CLEARBLUE “Advanced Pregnancy Test with Weeks Estimator” (the “Product” or the “Weeks Estimator”). The only notable exception is Dollar General, which carries CLEARBLUE pregnancy test kits but does not carry FIRST RESPONSE. [REDACTED]

[REDACTED]¹

6. CVS discontinued the sale of all branded analog pregnancy test kits, including both FIRST RESPONSE and CLEARBLUE analog tests, in May 2016. However, CVS has continued to sell FIRST RESPONSE and CLEARBLUE digital pregnancy test kits and “combo packs” (such as Test & Confirm) since that time.

¹ “Dollar share” refers to a brand or product’s retail dollar sales as a percentage of total pregnancy test kit dollar sales in the U.S. in a given period of time.

7. The Nielsen Company (“Nielsen”) is a firm that tracks sales, market share, and pricing information for consumer goods, among other products and services. Nielsen data is widely relied upon by marketing professionals in the regular conduct of their professional activities. Church & Dwight regularly receives data from Nielsen on sales, market share, and pricing information for brands and products in the U.S. home pregnancy test kit market.

8. JX 32 is a table containing Nielsen dollar and unit sales and market share data for the U.S. home pregnancy test kit market from the week ending April 30, 2011 through February 11, 2017.² I prepared this table, which accurately reflects data that was reported to Church & Dwight by Nielsen.

9. The top-left corner of JX 32 is labeled “TOTAL U.S. AOC.” This means that this table includes data for all grocery stores, drugstores, and dollar stores, as well as mass merchandisers, including Walmart and Target.³

- Each column from columns C through KS indicates the period for which the data is being reported. “W/E” stands for “Week Ending.” For example, the data under column C covers the week ending April 30, 2011, the data under column D covers the week ending May 7, 2011, and the data under column E covers the week ending May 14, 2011.
- Looking at the third row of the table, the heading on the left, titled “SALES DOLLARS,” corresponds to gross dollar sales (otherwise known as “revenue”) to consumers by retailers.
- Looking at row 51, the heading on the left, titled “\$ Shr of Diag PTK,” stands for “Dollar Share of Diagnostics Pregnancy Test Kits”⁴ – the data under this heading represents each listed product’s dollar share of the home pregnancy test kit market.
- Looking at row 99, the heading on the left, titled “SALES UNITS,” corresponds to the number of pregnancy test kits sold to consumers by retailers.

² “Unit share” refers to a brand or product’s retail unit sales as a percentage of total pregnancy test kit unit sales in the U.S. in a given period of time.

³ AOC stands for “All Outlets Combined,” which is a Nielsen term that describes which types of retailers are included in this data.

⁴ “Diag PTK” indicates that the reported data is limited only to pregnancy test kits and does not include other related products that are not pregnancy tests.

- Looking at row 147, the heading on the left, titled “U Shr of Diag PTK,” stands for “Unit Share of Diagnostics Pregnancy Test Kits” – the data under this heading represents each brand or product’s percentage share of the units (as measured by the number of pregnancy test kits, regardless of the number of sticks per kit) sold in the home pregnancy test kit market during each given period.

Underneath each of these headings are subheadings that correspond to the various home pregnancy test kits on the market. For example, “PTK CLEARBLUE CBE ADVANCED PTK WKS ESTIMATOR 1 CT” refers to the Weeks Estimator “one-count” pregnancy test kit, which includes one test stick in each kit, and “PTK CLEARBLUE CBE ADVANCED PTK WKS ESTIMATOR 2 CT” refers to the Weeks Estimator “two-count” pregnancy test kit, which includes two test sticks in each kit. “PTK FIRST RESPONSE FR ANALOG & DIGITAL PTK COMBO 2 CT” refers to the FIRST RESPONSE Test & Confirm pregnancy test kit which, as noted, contains one analog test stick and one digital test stick.

10. PTX 550 is a table containing Nielsen pricing data for the U.S. home pregnancy test kit market from the week ending April 30, 2011 through November 26, 2016. Nielsen tracks and reports pricing data in several different ways, including: Base Price, Promo Price, and Average Retail Price. “Base Price” is an estimate of the everyday or “regular” non-discounted retail price of a product in a store; “Promo Price” is the average “scanned” price of a product in stores where there was a promotion on that product⁵; “Average Retail Price” is the weighted average of the “Base Price” and the “Promo Price.” PTX 550 shows Average Retail Price information for the U.S. home pregnancy test kit market, as indicated in the top-left corner. I prepared this table, which accurately reflects data that was reported to Church & Dwight by Nielsen. Row 3 of PTX 550 is labeled “TOTAL U.S. AOC.” Again, this indicates that this table includes data for all grocery stores, drugstores, and dollar stores, as well as mass merchandisers,

⁵ A “scanned” price refers to the price of a product as it appears when scanned at the retail point of sale. This price would typically take into account discounts such as temporary price reductions, but not mail-in rebates or instant redeemable coupons.

including Walmart and Target. Each column from columns C through KH indicates the period for which the data is being reported. Each row of the table from rows 4 through 50 indicates the home pregnancy test kit for which the data is being reported.

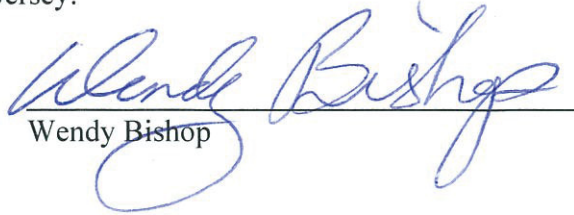
11. Church & Dwight also regularly receives data from third party firms about advertising expenditures for brands and products in the U.S. home pregnancy test kit, ovulation test kit, and fertility test kit markets. This includes data on advertising expenditures for competitor brands, as well as advertising expenditures for the FIRST RESPONSE brand. The Kantar Group (“Kantar”) is one such third-party firm that tracks advertising expenditures for consumer goods, among other products and services. Church & Dwight has at various times received advertising expenditure data from Kantar and Kantar data is widely relied upon by marketing professionals in the regular conduct of their professional activities.

12. PTX 549 is a table containing Kantar advertising expenditure data for U.S. home pregnancy test kits, ovulation test kits, and fertility test kits, from the week of December 27, 2010 through the week of July 25, 2016. This table was prepared at my request and under my supervision and accurately reflects data that was reported to Church & Dwight by Kantar.

- Column A of the table, with the heading “Brand Group,” corresponds to the various brands that market home pregnancy test kits. These include SPD’s CLEARBLUE brand (rows 7-65); E.P.T., which is sold by Prestige Brands Holdings, Inc. (rows 66-97); and Church & Dwight’s FIRST RESPONSE brand (rows 98-163). Row 170, titled “Grand Total,” corresponds to the total advertising expenditures in the category for all listed brands.
- Column B of the table, with the heading “MEDIA,” corresponds to the media vehicle – *e.g.* radio, television, the internet, newspapers, or magazines – through which the advertising took place. For example, rows 9 through 13 show advertising expenditures for various CLEARBLUE products on cable television.
- Column C of the table, with the heading “PRODUCT,” corresponds to the specific product or products that were advertised. For example, row 135 of the table shows advertising expenditures for FIRST RESPONSE pregnancy tests on network television.

- Each column from columns D through NF indicates the period for which the data is being reported. For example, Column G reports advertising expenditures for the week of January 3, 2011; column L reports advertising expenditures for all of January 2011; and column BS reports advertising expenditures for all of 2011, from January through December. Column NG reports data for the entire time period shown in this table, from the week of December 27, 2010 through the week of July 25, 2016.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this
18th day of August, 2017, at Ewing, New Jersey.


Wendy Bishop